

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRED J. CHURCH)	
Claimant)	
VS.)	
)	Docket No. 204,042
WHITE STAR COMMERCIAL and)	
McPHERSON CONTRACTORS, INC.)	
Respondents)	
AND)	
)	
KANSAS BUILDING INDUSTRY WORKERS)	
COMPENSATION FUND)	
Insurance Carrier)	

ORDER

Respondent, McPherson Contractors, Inc., and its insurance carrier, Kansas Building Industry Workers' Compensation Fund, requested Appeals Board review of the Order Granting Temporary Total Disability Compensation and Denying Medical Expenses entered by Administrative Law Judge Bryce D. Benedict on November 19, 1996. The Appeals Board heard oral arguments on February 6, 1997.

ISSUES

This is respondent McPherson Contractors, Inc.'s (hereinafter McPherson) second appeal of a preliminary hearing Order awarding benefits against them as the contractor pursuant to K.S.A. 1994 Supp. 44-503 where the subcontractor White Star Commercial (hereinafter White Star) has failed to pay benefits and did not have insurance. On remand from the Appeals Board's Order of August 29, 1996, the claimant was awarded preliminary hearing benefits. Respondent appealed and raised the following issues:

- (1) Whether the employee suffered an accidental injury arising out of and in the course of his employment.

- (2) Whether timely written claim was given pursuant to K.S.A. 44-520a.

Claimant raises an objection to the admissibility of an affidavit from Jonathan B. Allen.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board has jurisdiction to consider issues concerning whether or not the claimant served timely written claim to the respondent and whether his claimed injuries for which compensation is being sought arose out of and in the course of his employment. These issues are considered jurisdictional and are subject to review by the Board on an appeal from a preliminary hearing order entered pursuant to K.S.A. 1996 Supp. 44-534a(a)(2). See K.S.A. 1996 Supp. 44-551(b)(2)(A). However, the claimant's objection to the admission into evidence of the statement or "affidavit" of Jonathan B. Allen does not give rise to an issue which is considered jurisdictional by K.S.A. 1996 Supp. 44-534a(a)(2). Claimant does not allege the Administrative Law Judge exceeded his jurisdiction by considering this document. Accordingly, the Appeals Board does not have jurisdiction to determine this issue on an appeal from a preliminary hearing order.

The issue of whether claimant suffered injury by accident arising out of and in the course of his employment was decided in claimant's favor pursuant to his uncontradicted testimony at the September 22, 1995, preliminary hearing. Upon remand, another preliminary hearing was held on November 13, 1996. There was no new evidence offered at that hearing to persuade the new fact finder that he should disturb the previous determination of this issue. In fact, the only evidence introduced by respondent at that hearing was some payroll records of the subcontractor, White Star, which had been provided to the principal contractor, McPherson, during the period in question. Those records support the finding that claimant was working as an employee of White Star on the accident date. The Appeals Board agrees with the findings of the Administrative Law Judge. Based upon the evidence presented at the preliminary hearing, claimant has met his burden of proving he suffered personal injury by accident on the date alleged and that such accident arose out of and in the course of his employment with White Star, which was at that time operating as a subcontractor of McPherson.

Respondent argues that the issue of whether the claimant filed a timely written claim against the principal contractor, McPherson, was determined by the case of Coble v. Williams, 177 Kan. 743, 282 P.2d 425 (1955). However, the Coble case referred to a predecessor of the written claim statute applicable to this case, to wit, K.S.A. 44-520a, which was amended in 1955. For the reasons stated below, the Appeals Board finds Coble does not control the written-claim issue presented herein. Also, Coble references Williams v. Cities Service Gas Co., 139 Kan. 166, 30 P.2d 97 (1934) which held that a principal was not relieved from liability by being omitted as a respondent in the original proceeding.

Similarly, the claim against the principal McPherson herein was timely even though McPherson was not originally named as the respondent in this case.

Respondent attempts to count the number of days for filing a written claim against it from August 7, 1995, the date that White Star, the subcontractor, filed its accident report. That accident report was attached as an exhibit to respondent's brief to the Appeals Board. Claimant objected to respondent's counsel's attempt to submit evidence that was not a part of the record before the Administrative Law Judge at the time of the preliminary hearing. K.S.A. 1996 Supp. 44-555c(a) grants review by the Board "upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." The Board has consistently held that, absent a stipulation thereto by all parties, no new evidence may be admitted after the record is closed by the administrative law judge. Therefore, respondent's attempt to introduce the accident report by attaching a copy to his brief is procedurally incorrect. The Board will not consider the accident report filed by White Star.

K.S.A. 44-557(a) states:

"It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge"

Furthermore, K.S.A. 44-557(c) states:

"No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by filing an application with the director within one year of the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee"

Respondent contends that because the claim against McPherson was not served upon it until on or about March 21, 1996, which was more than 200 days after the June 6, 1995 accident, the written claim against it was not timely. Claimant argues that White Star's failure to file an accident report within 28 days as provided by K.S.A. 44-557 extends the time for filing of written claim to one year, citing Childress v. Childress Painting Co., 226 Kan. 251, 597 P.2d 637 (1979). However, as the accident report is not in evidence, the time for filing written claim cannot be found to have been extended. The

claimant has the burden of proving the various conditions upon which the right to benefits depends. K.S.A. 44-501. Where the respondent has denied that a timely written claim was made, claimant must show either that such a claim was made within 200 days or that no report of accident was filed within 28 days and that written claim was served within one year as required by K.S.A. 44-520a(a). Claimant has not shown that a separate written claim against McPherson was served within 200 days of the accident. However, claimant did file written claim against White Star within 200 days. The issue then is whether timely written claim against the subcontractor constitutes timely written claim against the principal.

It is uncontroverted that respondent McPherson had notice of the claim being made against it through the written claim dated March 21, 1996, and the amended Application for Hearing that was filed March 29, 1996. Upon being notified of the claim that McPherson was the principal contractor and statutory employer of claimant and was, therefore, liable for the accident which occurred while he was employed by the sub-contractor White Star, McPherson failed to file an accident report within 28 days. Whether McPherson can claim the benefit of the accident report that was filed by White Star is not currently before the Appeals Board because that accident report is not in evidence. Furthermore, a determination of that issue is not necessary because, under the facts presented, timely claim against White Star satisfies the written-claim requirements for McPherson as well.

The Administrative Law Judge was correct in determining that the statute for determining a contractor's liability is contained in the legislative changes to K.S.A. 44-503 which was amended by the legislature in 1994. The legislature added subsection (g) which states:

"In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation." K.S.A. 1994 Supp. 44-503(g). (Emphasis added.)

The amendments clarify the principal contractor's status as a guarantor under the compensation law. Claimants can no longer elect whether to proceed against the principal or the subcontractor.

McPherson's liability was established by K.S.A. 1994 Supp. 44-503(a) which states:

"(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade of business or which the principal has contracted to perform and contracts with any other person (in this section referred to the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or

proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed."

The provisions of K.S.A. 44-503, as amended in 1994, establish liability against the principal when the subcontractor fails to have workers compensation insurance coverage. Claimant did not discover the fact that the subcontractor White Star did not have insurance until September 1995 and a claim was thereafter filed within 200 days against the principal. Furthermore, the provisions of K.S.A. 1994 Supp. 44-503(g) do not require claimant to file a separate claim against the principal within the time period specified by K.S.A. 44-520a.

The argument is made by claimant that because no statute of limitations is identified in K.S.A. 1994 Supp. 44-503, that proceedings to secure compensation for a worker against a principal are controlled by K.S.A. 44-534(b):

"No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later."

Claimant argues that because the liability of the principal is in the place of the sub-contractor, liability for compensation exists as long as there is an application for hearing on file within the applicable time limits of K.S.A. 44-534. Therefore, the amended Application for Hearing adding McPherson was timely, as it was filed March 29, 1996, within three years of the June 1995, accident. The Appeals Board does not need to reach this argument to find timely written claim was made against the principal. Claimant made timely written claim against White Star. This is all the statute requires of claimant in order to proceed against the principal where the subcontractor is shown to be uninsured or unavailable.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bryce D. Benedict dated November 19, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Matthew S. Crowley, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director